

Message Text

CONFIDENTIAL

PAGE 01 GENEVA 01612 01 OF 03 041755Z
ACTION EB-08

INFO OCT-01 EUR-12 EA-07 IO-13 ISO-00 AF-08 ARA-06 NEA-10
FEA-01 AGRE-00 CEA-01 CIAE-00 COME-00 DODE-00 FRB-03
H-01 INR-07 INT-05 L-03 LAB-04 NSAE-00 NSC-05 PA-01
AID-05 SS-15 STR-04 ITC-01 TRSE-00 USIA-06 PRS-01
SP-02 OMB-01 OIC-02 /133 W
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AMEMBASSY OTTAWA
AMEMBASSY TOKYO
USMISSION OECD PARIS

CONFIDENTIAL SECTION 1 OF 3 GENEVA 1612

EO 11652: GDS
TAGS: GATT, ETRD, EEC
SUBJ: GATT COUNCIL DISCUSSION DISC AND RELATED TAX PRACTICES

REF: GENEVA 1521

1. FOLLOWING IS REPORT OF MARCH 2 GATT COUNCIL DISCUSSION ON
DISC AND RELATED TAX PRACTICES SUMMARIZED IN REFTEL.

2. EC, QUOTING LAVISHLY FROM SICS PANEL REPORT, L/4422, SAID
PANEL UNEQUIVOCALLY DEMONSTRATED INCOMPATIBILITY OF DISC WITH
PRINCIPLES AND PROVISIONS OF GATT; THIS CONFIRMED EC CHARGES
FIRST BROUGHT BEFORE THE COUNCIL IN 1973. EC FURTHER QUOTED
FROM 1976 INTERNATIONAL ECONOMIC REPORT OF THE PRESIDENT
(PAGE 77, INEXT TO BOTTOM PARA) RE EXISTENCE OF 9,090 DISC'S,
CHANNELING OF 75 PERCENT OF U.S. EXPORTS THROUGH DISC DEVICE,
AND 8 BILLION DOLLARS RESULTING INCREASE IN U.S. ANNUAL
EXPORTS AT COST OF 1.3 BILLION DOLLARS. NR
3. FACT THAT EC HAS CHOSE THIS PARTICULAR QUOTE FOR
CONFIDENTIAL

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PAGE 02 GENEVA 01612 01 OF 03 041755Z

INCLUSION IN THEIR PRESENTATION TO THE COUNCIL GIVES
FIRST HINT OF THE MAGNITUDE OF DAMAGE CLAIM THE EC AND
OTHER MIGHT PRESENT IF STAGE OF COMPENSATORY WITH-
DRAWALS (I.E. RETALIATION) SHOULD BE REACHED.

4. EC ASKED THAT GATT COUNCIL, ACTING IN CAPACITY OF
CONTRACTING PARTIES, CALL FOR EXPEDITIOUS TERMINATION OF

DISC.

5. CANADA HOPED U.S. WOULD NOW GIVE CONSIDERATION TO ENDING DISC AND BELIEVED COUNCIL SHOULD TAKE EARLY ACTION AND RECOMMEND END OF PRACTICE. SAID ITEM SHOULD REMAIN ON NEXT COUNCIL AGENDA.

6. U.S. (BRUNGART) SAID WE WOULD ADDRESS THIS AGENDA ITEM IN ITS ENTIRETY (I.E., THE ENTIRE ITEM ON TAX PRACTICES HAVING SUB-PARTS ON DISC AND THE TAX PRACTICES OF FRANCE, BELGIUM, NETHERLANDS). WE CONGRATULATED THE PANELS ON THEIR COMPETENT AND IMPARTIAL WORK AND ON THEIR CLEAR REPORTS. WE REMINDED COUNCIL THAT AT NOVEMBER SESSION WE STATED WE HAD BEEN DISAPPOINTED THAT THE PANEL ON DISC FOUND DISC INCONSISTENT, AT LEAST IN SOME RESPECTS, WITH ARTICLE XVI, BUT WERE PLEASED THAT PANELS ACCEPTED OUR ALTERNATE CONTENTION THAT IF DISC WAS INCONSISTENT, THEN THE COMPARABLE PRACTICES OF FRANCE, BELGIUM, AND THE NETHERLANDS WERE ALSO INCONSISTENT.

7. U.S. SAID THAT APPROPRIATE PROCEDURE AT THIS POINT WOULD BE FOR COUNCIL TO TAKE THE CUSTOMARY ACTION AND ADOPT THESE FOUR PANEL REPORTS. WE SAID THAT EC HAD NOTED THAT REPORTS HAD BEEN ISSUED FOUR MONTHS BEFORE, AND WE FELT COUNCIL SHOULD BE ABLE TO ADOPT THEM NOW. SUCH ADOPTION WOULD PROVIDE THE BASIS FOR SUBSEQUENTLY TURNING TO THE QUESTION OF POSSIBLE RECOMMENDATIONS OR FINDINGS OF THE TYPE ENVISAGED IN ARTICLE XXIII.

CONFIDENTIAL

CONFIDENTIAL

PAGE 03 GENEVA 01612 01 OF 03 041755Z

8. WE REMINDED COUNCIL THAT WE HAD ALL ALONG STRESSED THAT WE CONSIDERED FINDINGS OF ALL FOUR PANELS TO BE CLOSELY LINKED, SAID THEY HAVE BEEN LINKED IN BOTH SUBSTANCE AND FORM FROM THE OUTSET OF GATT CONSIDERATION AND WERE LINKED IN LEGISLATIVE HISTORY OF DISC IN U.S. WE SAID PANELS USED THE SAME ANALYSIS IN CONCLUDING THAT ALL THE TAX PRACTICES IN QUESTION WERE SUBSIDIES INCONSISTENT WITH GATT ARTICLE XVI. WE ADDED THAT QUOTES EC HAD JUST CITED FROM DISC PANEL REPORT WOULD HAVE FAMILIAR RING TO READERS WHO HAD READ THE OTHER THREE PANEL REPORTS. WE RECALLED THAT PANEL CHAIRMAN HAD IN NOVEMBER INTRODUCED ALL FOUR REPORTS IN ONE STATEMENT AND THAT THERE WERE CROSS-REFERENCES IN EACH OF THEM TO THE OTHERS; WE THUS BELIEVED THAT COUNCIL ACTION IN ADOPTING REPORTS SHOULD RELATE TO ALL FOUR.

CONFIDENTIAL

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CONFIDENTIAL

PAGE 01 GENEVA 01612 02 OF 03 041831Z

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SP-02 OMB-01 OIC-02 /133 W

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AMEMBASSY OTTAWA
AMEMBASSY TOKYO
USMISSION OECD PARIS

CONFIDENTIAL SECTION 2 OF 3 GENVA 1612

9. EC SAID THEY COULD AGREE TO NO LINKING OF FOUR PANEL REPORTS, AS CASES WERE COMPLETELY SEPARATE. SAID REGRETTABLE PRECEDENT HAD BEEN SET WHEN A COUNTRY K(I.E., U.S.) INTRODUCED A COUNTER-COMPLAINT AS A DEFENSE. ALSO SAID TOO MUCH TIME HAD BEEN CONSUMED IN AGREEING TO PANEL MEMBERSHIP. EC "DEPLORED" U.S. INSISTENCE THAT MEASURES WERE CONNECTED AND SAID SUCH INSISTENCE PUTS GATT CILIATION TECHNIQUES IN JEOPARDY.

10. JAPAN "WITHOUT JOING IN THE DEBATE WHICH HAS EN-SUED" (OVER LINKAGE) REMINDED COUNCIL OF THEIR VIEW THAT EARLIEST POSSIBLE TERMINATION OF DISC WOULD BE DESIRABLE.

11. FRANCE, SPEAKING ON OWN BEHALF WITH RESPECT TO FRENCH TAX PRACTICES, SAID CONSIDERATION OF PANEL REPORTS SHOULD BE KEPT SEPARATE. SAID FRENCH PRACTICES IN EFFECT SINCE 1917 WITHOUT INCITING U.S. OR ANYONE ELSE TO COMPLAIN. FRANCE PROMISED TO CIRCULATE A WRITTEN STATEMENT TO THE COUNCIL CALLING INTO QUESTION THE

CONFIDENTIAL

CONFIDENTIAL

PAGE 02 GENEVA 01612 02 OF 03 041831Z

PANEL'S CONCLUSIONS. SAID THEY HAD PRELIMINARY QUESTION RELATING TO WORDING OF PANEL REPORT ON NOTION OF "EXPORT ACTIVITY", WHICH SEEMS TO GO BEYOND THAT CONVEYED BY

LETTER OR SPIRIT OF THE GATT. IN THE SENSE OF GATT, AN EXPORT INVOLVES A SALE ABROAD OF A NATIONAL PRODUCT OR SERVICE WITH THE CRITERIA BEING THE CROSSING OF THE CUSTOMS BORDER OF THE EXPORTING COUNTRY. THE ACT OF EXPORTATION CEASES WHEN THE PRODUCT CROSSES THE BORDER OF THE IMPORTING COUNTRY. THUS ACTIVITIES OF FOREIGN BRANCHES OF FRENCH COMPANIES DO NOT INVOLVE "EXPORTS". CONCLUSIONS OF PANEL, IF FOLLOWED, WOULD ENTAIL DISCRIMINATION OF ECONOMIC AND COMMERCIAL NATURE, WOULD LEAD TO POLITICAL AND INTERNATIONAL PROBLEMS. THERE WOULD BE DISCRIMINATION BETWEEN FOREIGN COUNTRIES IN WHICH SUBSIDIARIES WERE LOCATED, AND IT IMPOSSIBLE TO ADJUST FRENCH SYSTEM. THUS, FRANCE COULD NOT ACCEPT PANEL CONCLUSIONS AND CONVINCED COUNCIL WOULD AGREE WITH FRANCE.

12. U.S. SAID FRENCH ARGUMENTS ON DETAILS OF THEIR SYSTEM WERE MATTER FOR PANEL, NOT COUNCIL, AND PANEL HAD ALREADY CONSIDERED THEM AND UNANIMOUSLY CONCLUDED FRENCH PRACTICES WERE INCONSISTENT WITH ARTICLE XVI. WE REGRETTED FRENCH STATEMENT AS IT SEEMED TO CALL INTO QUESTION LONG AND DETAILED WORK DONE BY GATT AND FISCAL EXPERTS ON PANEL. WE PROMISED REPORT FRENCH CONCERNS TO WASHINGTON BUT ASKED THAT COUNCIL ADOPT ALL FOUR PANEL REPORTS. WE CITED AS PRECEDENT FOR EARLY ADOPTION THE 1950 AUSTRALIA AMMONIA CASE WHEREIN AUSTRALIA HAD RESERVATIONS OVER WP CONCLUSIONS BUT DID AGREE TO ADOPTION OF REPORT.

13. U.S. FURTHER SAID THAT WITH RESPECT FRENCH CLAIM OVER 1917 ORIGIN OF FRENCH PRACTICES, IT WAS CLEAR TO ANYONE READING PANEL REPORT THAT PANEL WAS CONSIDERING FRENCH SYSTEM AS IT APPLIES TODAY. WE QUOTED FROM PANEL REPORT, PARAS 12 THROUGH 15, WHICH REFERRED TO CONFIDENTIAL

CONFIDENTIAL

PAGE 03 GENEVA 01612 02 OF 03 041831Z

MODIFICATIONS MADE AS RECENTLY AS 1971, 1973, AND EVEN 1975. WE ALSO NOTED THAT PANEL HAD EXAMINED DETAILED APPLICATION OF FRENCH SYSTEM, INCLUDING SUCH ASPECTS AS INTER-COMPANY PRICING PRACTICES, IN REACHING ITS CONCLUSIONS.

14. BELGIUM AGREED WITH FRANCE THAT PANEL REPORTS SHOULD BE CONSIDERED SEPARATELY, INOTED THAT THEIR SYSTEM HAD ORIGINATED IN 1919. SAID PANEL ERROR IN FINDING THEIR PRACTICES GUILTY WAS BASED ON PANEL'S OVERLY EXTENSIVE DEFINITION OF "EXPORT ACTIVITY". BELGIUM RESERVED RIGHT TO PRESENT TO PANEL MEANS TO DEFEND ITSELF AND TO SUBMIT A PAPER TO THEM. (BELGIUM LATER CLARIFIED THAT THEY NOT NECESSARILY REQUESTING RECONVENING OF PANEL, BY STATING IT NOT UP TO BELGIUM

TO JUDGE WHETHER PANELS HAVE COMPLETED THEIR WORK AND
WOULD LEAVE IT UP TO COUNCIL TO DECIDE WHAT TO DO WITH
PROMISED BELGIAN PAPER).

CONFIDENTIAL

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CONFIDENTIAL

PAGE 01 GENEVA 01612 03 OF 03 041917Z
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TO SECSTATE WASHDC 5675
INFO ALL EC CAPS 180
AMEMBASSY OTTAWA
AMEMBASSY TOKYO
USMISSION OECD PARIS

CONFIDENTIAL SECTION 3 OF 3 GENEVA 1612

16. NETHERLANDS ALSO FELT CONSIDERATION OF PANEL REPORTS SHOULD BE SEPARATE AND AGREED THAT THEIR PANEL HAD ALSO DEFINED "EXPORT ACTIVITIES" TOO WIDELY. NETHERLANDS SAID THEY COULD NOT SHARE PANEL CONCLUSIONS AND THUS RESERVED OWN POSITION. SAID UNFOUNDED DOUBTS BEING CAST UPON TERRITORIALITY PRINCIPLE OF TAXATION. SAID PARA 34 OF NETHERLANDS PANEL REPORT ERRONEOUSLY DESCRIBES APPLICATION OF WORLDWIDE SYSTEM AND DEMONSTRATES THE CONFUSION GENERATED BY HAVING FOUR DIFFERENT PRACTICES EXAMINED BY ONE SET OF PANEL MEMBERS.

17. NETHERLANDS SAID CORRECT DEFINITION OF "EXPORT ACTIVITY" WOULD REMOVE THE PREMISE FROM WHICH PANEL CONCLUSIONS SPRING. EXPORT ACTIVITY INVOLVES FOLLOWING STAGES: MANUFACTURER TO WHOLESALER, TO EXPORTER, TO WHOLESALER, TO CONSUMER. POINT WHERE FOREIGN IMPORTER HAS POWER TO DISPOSE OF THE GOODS IS THE FIRST POINT BEYOND "EXPORT ACTIVITY". PROFITS FROM THAT POINT ON DO NOT ARISE FROM EXPORT ACTIVITY. NETHERLANDS FURTHER

CONFIDENTIAL

CONFIDENTIAL

PAGE 02 GENEVA 01612 03 OF 03 041917Z

NOTED THAT PARA 18 OF THEIR REPORT ERRONEOUSLY CLAIMS THAT NETHERLANDS SAID THAT TAX BASE WAS ALWAYS THE SAME. ALSO SAID U.S. SUPPLIED NO EVIDENCE IN CONTENTION CONTAINED IN PARA 23 BUT ONLY SAID SUBSIDY PRACTICE "COULD" RESULT.

18. NETHERLANDS WENT ON TO SAY, WITH RESPECT TO PROCEDURES, THAT THIS WAS THE FIRST TIME IN HISTORY OF GATT THAT PANELS HAD NOT DISCUSSED CONCLUSIONS WITH THE INTERESTED PARTIES BEFORE EMISSION OF FINAL REPORT. SAID NETHERLANDS WAS ABLE TO SEE DRAFT REPORT, BUT BEFORE CONCLUSIONS SECTION WAS DRAFTED. SAID NETHERLANDS COULD HAVE CLEARED UP THE CONFUSION IF THEY HAD SEEN A DRAFT OF THE CONCLUSIONS IN ADVANCE. HOWEVER, NETHERLANDS SAID MATTER IS NOW BEFORE THE COUNCIL AND THEY PREPARED TO COOPERATE. ADDED THAT COUNCIL SHOULD BE ABLE TO DETERMINE THE GATT DEFINITION OF "EXPORT" WITHOUT THE PRESENCE OF FISCAL EXPERTS.

19. U.S. SAID THAT EFFORTS BY FRANCE, BELGIUM, NETHERLANDS TO OVERTURN PANEL CONCLUSIONS WERE UNPRECEDENTED AND TEND TO CALL INTO DOUBT GATT DISPUTE SETTLEMENT PROCEDURES AND REMINDED COUNCIL THERE ARE OTHER PANELS CURRENTLY AT WORK.

20. CANADA FELT FRANCE, BELGIUM, NETHERLANDS HAD RAISED INTERESTING QUESTIONS AND LOOKED FORWARD TO READING THE WRITTEN PRESENTATIONS. CANADA HOPED, HOWEVER, THAT THESE QUESTIONS WOULD NOT BE REGARDED AS QUESTIONING THE PANELS' WORK AND WOULD NOT INVOLVE REJECTION OF THE REPORTS. SAID IT NOT NECESSARY NOW FOR COUNCIL TO ADOPT THE REPORTS AND CANADA WOULD LIKE TO LEAVE "THIS WHOLE MATTER" UNTIL NEXT COUNCIL.

21. CHAIRMAN SAID COUNCIL WOULD REVERT TO THE ITEM (I.E., THE ENTIRE AGENDA ITEM) AT A LATER MEETING. NO ONE OPPOSED.

CONFIDENTIAL

CONFIDENTIAL

PAGE 03 GENEVA 01612 03 OF 03 041917Z

22. IN PARTING SHOT, EC SAID PRECEDING DISCUSSION SHOWED THE COUNCIL MIGHT HAVE BEEN IN POSITION TO SOLVE ONE OF THE MATTERS (I.E., DISC) WITHOUT DELAY IF THEY HAD NOT BEEN LINKED. EC SUGGESTED COUNCIL KEEP THIS IN MIND.

23. THERE WAS NO DISCUSSION OF RELEASE OF DOCUMENTS RELATING TO PANELS' WORK, AND NO DECISIONS IN THIS

AREA WERE TAKEN. COPIES OF EC, NETHERLANDS, FRENCH
STATEMENTS MENTIONED ABOVE ARE BEING HAND-CARRIED BY MARGARET
JONES FOR EB/OT BARRACLOUGH, STR WOLFF, AND TREASURY GADBAW.

24. COMMENT: RECOMMEND WASHINGTON FOCUS ON ABOVE CITED "EXPORT
ACTIVITIES" QUESTIONS, AS IT CLEAR THAT FRANCE, BELGIUM, NETHERLANDS
-- AND POSSIBLY
EVEN EC--INTEND PURSUE THESE ARGUMENTS. ALTHOUGH
TECHNICALLY COUNCIL HAS AGREED REVERT TO OVERALL SUBJECT
AT A FUTURE SESSION, IT SEEMS LIKELY THAT FURTHER DIS-
CUSSION WILL TAKE PLACE AT THE VERY NEXT COUNCIL. WHILE
A GATT COUNCIL SESSION CAN BE INVOKED UPON TEN DAYS'
NOTICE BY ANY CP, THE NEXT REGULARLY HELD SESSION OF
THE COUNCIL MIGHT,IBARRING UNUSUAL DEVELOPMENTS, BE EX-
PECTED WITHIN THE NEXT SIX WEEKS. CATTO

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